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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re: ACACIA MEDIA TECHNOLOGIES CORPORATION	Case No. C 05-01114 MDL No. 1665 **JOINT CASE MANAGEMENT STATEMENT** **DATE: March 7, 2008** **TIME: 10:00 am** **CTRM: Hon. James Ware**

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Pursuant to the Court's 6th Claim Construction Order of February 13, 2008, the parties to the above-entitled action jointly submit this Case Management Statement.

This Statement is divided into two parts. Part One sets forth the joint position of plaintiff Acacia, the Internet defendants[1], and the Cable defendants[2]. All of these parties have agreed to a case management procedure and schedule, with their only disagreement being whether the named inventors on the asserted patents should be deposed. The joint position of plaintiff, the Internet defendants and the Cable defendants, as well as their differing positions with respect to the depositions of the inventors, are set forth in Part One. Part One also includes a statement from Acacia, the Internet defendants and the Cable defendants regarding their intention to respond to the Satellite defendants' arguments (set forth in Part Two) by March 5, 2008.

Part Two sets forth the position of the Satellite defendants[3].

PART ONE

POSITION OF PLAINTIFF ACACIA, THE INTERNET DEFENDANTS, AND THE CABLE DEFENDANTS

I. INTRODUCTION

As set forth below, Acacia, the Internet defendants, and the Cable defendants agree that the next phase of this multi-district litigation should be limited to addressing the alleged invalidity of the

[1] The Internet defendants are: New Destiny Internet Group LLC; Audio Communications, Inc.; VS Media Inc.; Ademia Multimedia LLC; Adult Entertainment Broadcast Network; Cyber Trend Inc.; Lightspeed Media Group, Inc.; Adult Revenue Services; Innovative Ideas International; Game Link Inc.; Global AVS Inc.; ACMP LLC; Cybernet Ventures Inc.; National A-1 Advertising Inc.; AEBN, Inc; International Web Innovations, Inc., Offendale Commercial BV, AskCS.com.

[2] The Cable defendants are: Time Warner Cable Inc., CSC Holdings, Inc., Comcast Cable Communications, LLC; Charter Communications, Inc.; Armstrong Group; Block Communications, Inc.; East Cleveland Cable TV and Communications LLC; Wide Open West Ohio LLC; Massillon Cable TV, Inc.; Mid-Continent Media, Inc.; US Cable Holdings LP; Savage Communications, Inc.; Sjoberg's Cablevision, Inc.; Loretel Cablevision; Arvig Communications Systems; Cannon Valley Communications, Inc.; NPG Cable, Inc.; Cable One, Inc.; Mediacom Communications Corp.; Bresnan Communications; Cequel III Communications I, LLC (dba Cebridge Connections); Coxcom, Inc.; Hospitality Network, Inc., Cable America, Inc.; Insight Communications, Inc. and Bresnan Communications.

[3] The Satellite defendants are: The DIRECTV Group, Inc.; EchoStar Satellite LLC; and EchoStar Technologies Corp.

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asserted claims because they are indefinite under 35 U.S.C. § 112, ¶ 2 and/or because they fail to comply with the written description and/or enablement requirements of 35 U.S.C. § 112, ¶ 1. These parties propose a schedule whereby the parties can identify, based on the Court's constructions, indefiniteness, written description and/or enablement issues that require adjudication by the Court at this time and those that can be resolved by stipulation, and whereby the disputed issues can be joined for resolution by way of dispositive motions to be brought by defendants. Following adjudication of these motions, the parties shall meet and confer and provide the Court a proposed order concerning the further disposition of this case.

II. DISCUSSION

A. Acacia's, the Internet Defendants' and the Cable Defendants' Agreed-Upon Proposed Dispositive Motion Schedule

As a result of all of the determinations by the Court in connection with its six claim construction orders, Acacia, the Internet defendants, and the Cable defendants believe that, in the interest of judicial economy, the defendants should identify and, if necessary, file Rule 56 motion(s) for summary judgment of invalidity for indefiniteness under 35 U.S.C. § 112, ¶ 2 and for failure to comply with the written description and enablement requirements of 35 U.S.C. § 112, ¶ 1, so that the invalidity of the asserted claims on these grounds can be stipulated to or adjudicated.

In order to determine if there is a need for the Court to entertain dispositive motions on indefiniteness, written description or enablement issues, the parties agree to meet and confer to determine which § 112 issues require adjudication by the Court at this time and which can be resolved by stipulation. Accordingly, by March 28, 2008 defendants shall provide Acacia with a list of motions they would intend to make in this phase of the action alleging that one or more of the asserted claims are invalid as indefinite, or for failure to satisfy the written description or enablement requirements.

By April 4, 2008, Acacia shall identify, from the list provided by defendants, those disputed issues for which Acacia would oppose defendants' proposed dispositive motions and identify those issues for which Acacia would not oppose defendants' proposed dispositive motion (grounds on which Acacia will agree to stipulate to invalidity).

By April 11, 2008, defendants will identify, based on the invalidity grounds identified by Acacia to which Acacia will agree to stipulate, which of its previously-identified intended § 112 motions it will proceed to make in this phase of the action.

By April 18, 2008, the parties shall file a Joint Stipulation identifying the specific disputed issues to be included in one or more dispositive motion(s) to be brought by defendants as well as the invalidity grounds to which Acacia will stipulate.

The parties further agree that the Court should enter the following schedule for dispositive motions:

a. By June 20, 2008, defendants shall file such dispositive motions together with any supporting declaration testimony on the disputed issues identified in the Joint Stipulation;

b. By August 22, 2008, Acacia shall file any and all oppositions to the dispositive motions together with any supporting declaration testimony;

c. By October 13, 2008, defendants shall file any and all reply briefs to the dispositive motions together with any supporting declaration testimony; and

d. The Court shall set a hearing date for these motions for summary judgment as soon as practicable for the Court after October 13, 2008.

B. Following the Court's Rulings on Defendants' Summary Judgment Motions, The Parties Shall Meet and Confer on How to Proceed

Following the Court's ruling(s) on any motion(s) for summary judgment, the parties shall meet and confer and determine whether they agree that it is appropriate to prepare and submit to the Court a proposed Stipulation and Final Judgment in a form mutually acceptable to all parties and to the Court which gives effect to the Court's summary judgment rulings and to any stipulations of invalidity made by Acacia. If less than all asserted claims are adjudicated or stipulated to, the parties will determine if Rule 54(b) certification for appeal to the United States Court of Appeals for the Federal Circuit is warranted, and on what grounds.

C. No Formal Discovery Plan is Necessary at This Time

Acacia, the Internet defendants, and the Cable defendants agree that, at this time, discovery directed to declarants giving testimony in support of or in opposition to any of the § 112 motions described above should be permitted. The Cable and Internet defendants also believe that discovery directed to the named inventors on the patents in suit, limited to matters relevant to the § 112 motions, should also be permitted, but Acacia objects to such discovery of the inventors. Acacia, the Internet defendants and the Cable defendants agree that the Court should continue its stay of all other discovery in order to permit the Court to decide defendants' dispositive motion(s).

Acacia's Position With Respect to Discovery of Inventors:

The Court should not lift its stay of discovery for the purpose of permitting defendants to depose the named inventors in connection with these motions. The testimony of inventors is absolutely legally irrelevant to any of the § 112 issues of indefiniteness, enablement and written description, which all relate to how a hypothetical person of ordinary skill in the art – not the inventor – would understand the patent document itself. *See, Vitronics, Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1584-85 (Fed. Cir. 1996) (holding that inventor testimony as to subjective intent and claim construction have no effect and are given no deference as to claim construction); *Northern Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931, 941 (Fed. Cir. 1990) ("A decision on the issue of enablement requires determination of whether a person skilled in the pertinent art, using the knowledge available to such a person and the disclosure in the patent document, could make and use the invention without undue experimentation."); *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1366 (Fed. Cir. 2004) ("this court assesses the written description possession test 'from the viewpoint of one of skill in the art.'")

Internet and Cable Defendants' Position With Respect to Discovery of Inventors:

Acacia incorrectly states that inventor testimony is irrelevant to any validity determinations under § 112. For example, courts have routinely held that inventor testimony, including evidence of an inventor's failure to practice his or her own invention, provides "strong evidence" of non-enablement. *See, e.g., Ormco Corp. v. Align Tech., Inc.*, 498 F.3d 1307, 1319 (Fed. Cir. 2007) (inventor's failed attempt "to enable his invention in a commercial embodiment of the patented invention" was "strong evidence that the patent specification lacks enablement" supporting summary judgment of non-enablement); *Pharmaceutical Resources, Inc. v. Roxane Labs., Inc.*, 2007 WL 3151692 (Fed. Cir. 2007) (unpublished) ("unsuccessful attempts . . . to practice" the invention support summary judgment of non-enablement); *AK Steel Corp. v. Sollac*, 344 F.3d 1234, 1244 (Fed. Cir. 2003) (patentee's "own failures to make and use the later claimed invention at the time of the application" evidence of undue experimentation); *Enzo Biochem, Inc. v. Calgene, Inc.*, 188 F.3d 1362, 1371 (Fed. Cir. 1999) (considering "inventor's own failed attempts to control the expression of other genes in prokaryotes and eukaryotes using antisense technology" in evaluating enablement); *Bio-Technology General Corp. v. Novo Nordisk Pharmaceuticals, Inc.*, 2004 WL 1739722 at *24 (D. Del. 2004) (finding "Novo's own failed attempts at producing ripe hGH pursuant to the teaching of the 1983 PCT application persuasive evidence of non-enablement."). Accordingly, inventor testimony is relevant to defendants' § 112 summary judgment motions.

D. Acacia, the Internet Defendants and the Cable Defendants Require an Opportunity to Respond to The Satellite Defendants' Memorandum

The Satellite defendants propose that, in addition to § 112 summary judgment motions, non-infringement summary judgment motions be filed in the next phase of this action as well. Rather than simply provide the Court with this proposal, however, the Satellite defendants incorporate herein an entire brief in support of their proposal. None of the other parties to this action received this brief until after hours (eastern time) on Thursday, February 28, the day before the Court ordered this joint statement to be filed.[4] Accordingly, Acacia and at least some of the defendants intend to file briefs explaining their opposition to the Satellite defendants' position on or before Wednesday, March 5, 2008.[5]

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[4] Responding to the Satellite Defendants' comments in footnote 6, from plaintiff's perspective, the issue is not that Acacia is surprised that the Satellite Defendants seek non-infringement summary judgment motions. Acacia and the Court are prejudiced and inconvenienced by the Satellite Defendants waiting until the night before the Joint Statement was due to provide an extensive legal brief with citations supporting their position. Had the Satellite Defendants, as plaintiff's counsel had requested on Tuesday, provided plaintiff the then current draft of their proposed statement and brief, plaintiff would have had an opportunity to respond in kind and all parties could have complied with the Court's order to have a single, comprehensive Joint Case Management Report filed on Friday, February 29. Plaintiff now requires, as do the defendants which disagree with the Satellite Defendants, to file a subsequent brief next week addressing the points and legal citations provided.

[5] In all events, while it is premature and inefficient to proceed with summary judgment motions of

PART TWO

SATELLITE DEFENDANTS' POSITION:

The Court's *Markman* orders have paved the way for a final resolution of this case. The Satellite Defendants believe that a set of summary judgment motions based on written description, enablement, and indefiniteness 35 U.S.C. § 112, as well as targeted non-infringement motions based on a handful of the Court's constructions, will resolve this case in the most efficient manner for an appeal to the Federal Circuit. In addition to filing invalidity motions based on § 112, the Satellite Defendants anticipate filing for summary judgment of non-infringement based on several discrete but related grounds.[6] The Satellite Defendants anticipate potential non-infringement motions based on the Court's constructions of the terms "one of the remote locations," "central processing location/local distribution system," the performance of claim steps by the "transmission system," the term "responsive to," and the order that certain claim steps must be performed. If the Court grants these motions, those non-infringement findings, taken together with the Court's prior invalidity rulings, would completely dispose of all asserted claims of all four patents asserted against the Satellite Defendants.

Limiting the parties to motions based only on 35 U.S.C. § 112, by contrast, would not fully dispose of this case at this stage of the proceedings. The '720 patent is asserted against only the Satellite Defendants. While the Satellite Defendants believe there are certain § 112 motions currently ripe for consideration, these motions would not resolve all of the asserted claims against the Satellite Defendants. Given the work and effort that the Court and the parties have dedicated to

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non-infringement in the next phase, if the Court grants permission to any party to file a summary judgment motion on non-infringement, the Cable defendants and Internet defendants request that the Court grant permission to all other parties to do likewise. Additionally, the Cable and Internet defendants reserve the right to file other invalidity motions at a later date.

[6] The argument that Acacia has been taken by surprise by the Satellite Defendants' non-infringement motion proposal is difficult to understand. Upon receiving Acacia's draft CMC on Tuesday afternoon, February 26, the Satellite Defendants' counsel called Acacia's counsel the next morning to alert them that the Satellite Defendants would propose filing non-infringement motions, and provided the Satellite Defendants' statement the following day, February 28 — the same day that the Cable and Internet Defendants provided their proposal to Acacia.

this case, it makes little sense to raise an appeal to the Federal Circuit in piecemeal fashion — an approach the Federal Circuit has repeatedly rejected. *See, e.g.*, *Nystrom v. TREX Co.*, 339 F.3d 1347, 1350 (Fed. Cir. 2003) ("[T]he parties and the district courts are *obliged to conclude patent cases in strict compliance* with the finality rule to avoid unnecessary litigation over jurisdictional issues in perfecting an appeal." (emphasis added)); *see also Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 414 F.3d 1376, 1380 (Fed. Cir. 2005); *Pause Tech., LLC v. TiVo, Inc.*, 401 F.3d 1290, 1291 (Fed. Cir. 2005). For that reason alone, the proposal of Acacia, the Internet Defendants, and the Cable Defendants is inefficient and risks prolonging a case that, after five years and complex procedural maneuvering by Acacia, all parties wish to draw to a close.

An appeal based solely on motions under 35 U.S.C. § 112 would also contravene the Federal Circuit's direction that it be provided a complete record with full context about the accused devices. The Federal Circuit recently emphasized that it is "vital" that it understand the accused products to construe claims on appeal. *Lava Trading, Inc. v. Sonic Trading Mgmt., LLC*, 445 F.3d 1348, 1350 (Fed. Cir. 2006). Without adequate information about the accused products, the Federal Circuit "cannot assess the accuracy of *any infringement or validity determination*." *Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.*, 442 F.3d 1322, 1327 (Fed. Cir. 2006) (emphasis added); *see also Pall Corp. v. Hemasure, Inc.*, 181 F.3d 1305, 1308 (Fed. Cir. 1999); *Scripps Clinic & Research Found. v. Genentech, Inc.*, 927 F.2d 1565, 1580 (Fed. Cir. 1991). Indeed, "any articulated definition of a claim term ultimately must relate to the infringement questions that it is intended to answer." *E-Pass Techs., Inc. v. 3Com Corp.*, 473 F.3d 1213, 1219 (Fed. Cir. 2007). Failure to provide sufficient context of the accused devices creates "impediments to a full review," *Wilson*, 442 F.3d at 1327, and forces the Federal Circuit into an "advisory" role, which it disdains. *Lava Trading*, 445 F.3d at 1350.

If the record does not contain adequate information about the accused products, the Federal Circuit may remand and frustrate the efforts of the Court and the parties to dispose of the entire case. *See, e.g.*, *Bayer AG. v. Biovail Corp.*, 279 F.3d 1340, 1349 (Fed. Cir. 2002) (remanding and refusing to engage in claim construction on appeal because the district court had not performed a comprehensive claim construction based on a complete record). For example, in *Wilson Sporting Goods*, the Federal Circuit admonished the district court and the parties, noting that "despite entry of a final judgment, neither the trial court nor the parties supplied this court with any information about the accused products." *Wilson*, 442 F.3d at 1327.

The Satellite Defendants propose the following schedule for dispositive invalidity and non-infringement motions and related discovery:

Action to be Taken	Deadlines Proposed
Defendants provide Acacia a list of their dispositive motions based on written description, enablement, indefiniteness, or non-infringement.	March 28, 2008
Acacia informs Defendants which motions it will oppose	April 4, 2008
Defendants identify which of its previously-identified intended motions they will proceed to file	April 11, 2008
Parties file a Joint Stipulation identifying the specific disputed issues to be included in one or more dispositive motion(s) to be brought by Defendants as well as the invalidity grounds to which Acacia will stipulate	April 18, 2008
Dispositive motions filed	June 20, 2008
Oppositions to dispositive motions filed	August 22, 2008
Replies to oppositions to dispositive motions filed	October 13, 2008

This proposal would not add undue complexity or delay to this stage of the case. Indeed, the Satellite Defendants' proposal provides for summary judgment briefing on exactly the same schedule proposed by Acacia, the Internet, and Cable Defendants for invalidity motions. To avoid delay and to provide for the efficient resolution of this case, the Satellite Defendants have specifically selected non-infringement motions based on a core set of facts that are not reasonably subject to dispute and that would require only limited discovery and a limited number of declarants.[7] For example, it cannot be disputed that the Satellite Defendants' direct broadcast satellites are

[7] There remain additional non-infringement and invalidity motions that the Satellite Defendants are willing to defer subject to a final ruling on Acacia's appeal by the Federal Circuit.

incapable of transmitting signals to “a single remote location,” as required by the Court’s construction of Claim 41’s final element. To the extent that Acacia wishes to test the truth of the Satellite Defendants’ belief regarding the undisputed facts, it can depose the Satellite Defendants’ declarants before filing its opposition, time for which the Satellite Defendants have specifically provided in their proposed schedule. Even with adequate time for Acacia to take discovery, under the Satellite Defendants’ proposal reply briefs would be due only six weeks after Acacia’s proposed date for replies.

Of course, any defendant not wishing to raise non-infringement motions would not be required to do so. No discovery by Acacia of those parties electing not to file non-infringement motions would be necessary. Because the non-infringement motions are permissive, rather than mandatory, under this proposal any Defendant can avoid additional discovery by choosing not to file motions for summary judgment of non-infringement.

Nor would the Satellite Defendants’ proposal introduce delay. Expert testimony will undoubtedly be required for any summary judgment motions on invalidity; the limited factual discovery relevant to the Satellite Defendants’ non-infringement motions could be accommodated during the same time period. For all the above reasons, the Satellite Defendants respectfully request that the Court adopt their proposed schedule.

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